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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 565

MONROE AUTO EQUIPMENT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–7a) is reported at 347 F. 2d 401. The opinion and order of the Federal Trade Commission (Pet. App. 15–60) [1] have not been officially reported.

JURISDICTION

The order of the court of appeals affirming the Commission's order was entered on June 16, 1965, and the final decree enforcing that order was entered on August 3, 1965 (Pet. 8a–9a). The petition for a writ of certiorari was filed on September 13,

[1] "Pet. App." refers to the appendix to petitioner's brief filed in the court below.

1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Commission's findings (a) that petitioner discriminated in price in granting affiliated warehouse distributor-jobber purchasers the 20% warehouse distributor discount on products which they purchased for resale at the jobbing level, while competing independent jobbers were required to purchase at prevailing jobber prices; and (b) whether the effect of this practice may be substantially to lessen competition in violation of Section 2(a) of the amended Clayton Act.

2. Whether the Commission's cease-and-desist order was appropriate to prevent the continuation of the unlawful practice found, or was unduly vague and imprecise.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of com-

merce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

The Federal Trade Commission instituted proceedings against petitioner, Monroe Auto Equipment Company ("Monroe"), on November 5, 1962, charging that the 20% allowance which it granted to affiliated warehouse distributor-jobber entities on "sales" by such warehouse distributors ("WDs") to their own jobbing outlets constituted price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[2]

Many of the basic facts in this proceeding are not in dispute and were stipulated, as follows: Monroe manufactures and distributes a line of automotive products consisting chiefly of shock absorbers, sway bars, load levelers, and power-steering components. It sells these products to approximately 300 WDs, who in turn sell them to approximately 11,000 jobbers for distribution to garages, gasoline stations and other customers servicing the general public. WDs purchase from Monroe at its suggested "net jobber" prices and resell to jobbers at the same prices, receiving a 20% allowance on sales to "approved" Monroe jobbers (Pet. App. 66–67).

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[2] Petitioner's answer denied the charges and raised the defenses of "cost justification" and "meeting competition" (Pet. App. 6). But as the court below noted "these defenses were not pressed and are not now live issues" (Pet. 2a).

Certain of petitioner's WD customers own or control jobbing outlets classified by petitioner as "approved" jobbers. On "sales" of Monroe products by these WDs to such outlets, petitioner grants the regular 20% WD allowance. Similarly, Monroe has recognized as WDs certain organizations owned or controlled by "approved" Monroe jobbers. On sales by such WDs to their jobber-owners, Monroe likewise grants the WD allowance. In both of these described situations, the jobbers or jobbing outlets involved are in active and substantial competition in the resale of Monroe products with jobbers having no WD affiliation, who purchase from WDs at the regular suggested jobber prices (Pet. App. 67–68).

The auto parts jobbing business is highly competitive and is characterized by narrow net profit margins ranging usually between 1% and 5%, averaging less than 4%. Illustrative of the competitive situation is the fact that the 2% cash discount normally allowed by auto parts suppliers is important to jobbers in determining their profit margins and in the successful operation of their businesses (Pet. App. 68).

Following full administrative hearings, at which evidence to supplement the stipulated facts was adduced by Commission counsel with regard to (1) the commercial relationships existing between Monroe and its "approved" jobbers, and (2) the organization and operation of representative WD–jobber entities, the Commission found that the charges were sustained. In so finding, the Commission concluded that (1) an "indirect purchaser" relationship existed

between petitioner and unaffiliated "approved" jobbers, and (2) that the affiliated WD-jobber organizations were "direct purchasers," since "for all practical purposes" they were operated as single business units, so that any benefits conferred on one aspect of the operation would "in the light of the business realities shown on this record," result in a direct benefit to the other (Pet. App. 19, 25).[3] It further concluded that these facts "amount to a prima facie showing of price discrimination among competing customers" which Monroe had failed to rebut (Pet. App. 25). The Commission adopted the examiner's conclusion that the effect of this discriminatory practice may be substantially to lessen, injure, destroy or prevent competition with the nonfavored jobbers in violation of Section 2(a) of the amended Clayton Act (Pet. App. 13). A cease-and-desist order was entered directing Monroe to cease discriminating in price by "selling * * * to any purchaser at net prices higher than the net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price" (Pet. App. 15).

The court of appeals unanimously affirmed (Pet. 1a–7a). It found that there was "substantial evidence in this record that Monroe sold to direct-buying WD-jobber entities for redistribution through affiliated jobber outlets at an allowance of 20%, while independent jobbers, in competition with these same

[3] The hearing examiner, reaching the same result, found that all "approved" Monroe jobbers, both independent and affiliated, were "indirect purchasers" (Pet. App. 14–15).

outlets in the resale of Monroe products, were required to pay regular jobber prices on their 'indirect purchases' from Monroe through WDs" (Pet. 4a–5a). It further held that "according to the proper competitive injury criteria, the Commission properly affirmed the examiner's finding that petitioner's discriminatory allowances would be likely to result in the requisite anticompetitive effects proscribed by the Act" (Pet. 7a).

ARGUMENT

The decision below is correct and the petition presents no question warranting review by this Court.

1. Petitioner contends that the court of appeals erred in upholding the Commission's finding that *as a matter of law* an "economic benefit" resulting from common ownership of a WD-jobber enterprise constitutes price discrimination under the statute. But the Commission made no such finding. The issue presented for review, as the court properly recognized, was whether *in fact* the WD-jobber entities in the record were so organized and operated that they constituted single business units and thus "direct purchasers" from Monroe. In this respect the Commission concluded that the evidence demonstrated such unity of identity that "a discount to one arm of the entity must naturally flow to and benefit the other arm of the entity." The court held this finding to be supported by substantial evidence, such as that discussed in note 3 of its opinion (Pet. 4a–6a).[4] The

[4] The court cited the "illustrative situation" of Hart's Automotive Parts Company, Inc., of which one individual, R. Henry Hart, Jr., was president and controlling stockholder. At this

sufficiency of the evidence is a question "which Congress has placed in the keeping of the Courts of Appeals." *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

2. Petitioner's contention that the Commission and the court have "in effect adopted a *per se* rule prohibiting common ownership or affiliation between warehouse and jobbers" is without merit (Pet. 6). Neither decision in any way inhibits an organization from acting both as a WD and as a jobber of automotive parts. But the law is clear that when such organizations purchase for resale at the jobber level, a manufacturer may not discriminate in their favor where injury to competing jobbers may result. This Court recognized this principle in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475.

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company's main office in Chattanooga, it "functioned as a WD" and also "maintained a sales counter for servicing the jobber trade. At the same time it maintained another sales counter in the same building for selling as a jobber to the dealer trade. Within Chattanooga itself, the company operated three unincorporated branches (in addition to the main office), each of which functioned solely as a jobber, obtaining their products from Hart's central office warehouse." In addition, the court noted that outside Chattanooga Hart's "maintained four jobber corporations, all named Hart's Automotive Parts Company," and that these too were "approved" Monroe jobbers. The court further observed that "Mr. Hart acknowledged that each of them, with one exception, was opened with capital supplied primarily by himself, and that he derived his basic income from the Hart's Automotive operation." The court went on to discuss various organizational and operational details, making it additionally clear that the Commission was well justified in finding that Hart's was a "single business enterprise." For similar examples, see the Commission's discussion of the R. T. Clapp and TVK companies at Pet. App. 23–24.

Moreover, the Commission has time and again issued cease-and-desist orders in "dual distribution" cases of this type.[5] This consistent administrative construction and application of the statute is entitled to "great weight." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391.

3. The court of appeals approved the Commission's ruling that independent jobbers who purchased from non-affiliated WDs were nevertheless "indirect purchasers" from Monroe within the meaning of Section 2(a). The Commission frequently has relied upon the "indirect purchaser" doctrine in dealing with persons operating at different levels in the distributive process,[6] and the courts have upheld such use of the doctrine. *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109 (C.A. 2), *certiorari denied*, 371 U.S. 824; *Purolator Products, Inc.* v. *Federal Trade Commission*, — F. 2d —— (C.A. 7), No. 14704, decided October 22, 1965. *Cf. Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 135 (C.A. 2), *certiorari denied*, 331 U.S. 806; *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310,

[5] See, for example, *Hansen Inoculator Co.*, 26 F.T.C. 303; *Albert L. Whiting*, 26 F.T.C. 312; *Nitragin Co.*, 26 F.T.C. 320; *American Oil Co.*, 29 F.T.C. 857, 864–65 (1939); *Sherwin Williams Co.*, 36 F.T.C. 25; *Firestone Tire & Rubber Co.*, 55 F.T.C. 1759, 1761; *E. Edelmann & Co.*, 51 F.T.C. 978, 1001, *affirmed*, 239 F. 2d 152 (C.A. 7), *certiorari denied*, 355 U.S. 941.

[6] *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537; *Luwor, Ltd.*, 31 F.T.C. 658; *Dentists' Supply Co.*, 37 F.T.C. 345; *Champion Spark Plug Co.*, 50 F.T.C. 30; *General Motors Corp.*, 50 F.T.C. 54; *E. Edelmann & Co.*, 51 F.T.C. 978, *affirmed*, 239 F. 2d 152 (C.A. 7), *certiorari denied*, 355 U.S. 941.

312 (S.D. N.Y.). In the *American News* case the court ruled that, in determining whether a seller had violated Section 2(d) of the Robinson-Patman Act by giving a favored customer promotional allowances not made available to its other customers on proportionately equal terms, the Commission properly treated the favored customer, who purchased from the seller's wholesalers, as an indirect purchaser from the seller. The court stated (300 F. 2d 109): "If the manufacturer deals with a retailer through the intermediary of wholesalers, dealers, or jobbers, the retailer may nevertheless be a 'customer' or 'purchaser' of the manufacturer if the latter deals directly with the retailers and controls the terms upon which he buys."

In the present case, petitioner challenges the application of the indirect-purchaser doctrine on the ground that it may be appropriately used only where necessary to correct such drastic evils as the misuse of the economic power of large buyers, or where the price discrimination takes the usual form of selling to different customers at different dollar-and-cents prices (Pet. 10–11). There is no warrant for the limitation that petitioner suggests. *American News Co., supra.* In the present case the Commission properly found that such relationship existed from an examination of "the contracts between the WDs and Monroe, the contract between the WDs and jobbers, and the testimony in the record with respect to these agreements" (Pet. App. 18).

4. This Court long ago established that the Commission is warranted in finding injury to competition

within the meaning of Section 2(a) from evidence that a manufacturer charged one buyer a lower price for goods than it afforded the purchaser's competitors for goods of like grade and quality. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46–47. In that case the Court stated (at pp. 50–51):

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices. * * * It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitiors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

As *Morton Salt* has been consistently applied in the Commission's automotive parts cases, the requisite competitive injury may readily be inferred from substantial price discriminations which occur in a keenly competitive market characterized by narrow profit margins. *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152, 154 (C.A. 7), *certiorari denied*, 355 U.S. 941; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, 254–255 (C.A. 7),

certiorari denied, 353 U.S. 938. Each of these factors is present in the instant proceeding. The discriminatory WD allowance of 20% is plainly substantial, and it was stipulated that the automotive parts jobbing business is highly competitive and involves small net profit margins (Pet. App. 68).

Petitioner, however, questions the nature of the competitive advantages accruing to the favored WD-jobber customers in the present case, claiming that they are not readily measurable "in dollars and cents" (Pet. 12). But it is apparent that these purchasers can utilize the profits derived from their greater discounts in a variety of ways: existing jobbing facilities and services can be improved; more countermen or salesmen employed; additional jobbing branches opened; losses incurred in other aspects of the business can be subsidized; or the additional profit can simply be pocketed by the individuals who own or control the enterprises.[7]

[7] There is no merit to petitioner's contention (Pet. App. 13) that the Commission's order is unduly vague. The Commission, of course, has broad discretion to determine the appropriate scope and form of its orders (see *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392–393), and the court of appeals specifically considered and rejected petitioner's challenge to the order (Pet. App. 7a). If a situation should ever arise in which petitioner is unable to determine whether particular sales would violate the order, it may always seek advice thereon from the Commission. See *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394.

CONCLUSION

The decision of the court of appeals is correct. There is no conflict among the circuits, and the decision below accords with the pertinent administrative and judicial precedents. There is accordingly no occasion for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1966.

I authorize the filing of the foregoing brief in opposition. I shall shortly file a memorandum setting forth the views of the United States on this case.

THURGOOD MARSHALL,
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